169 (4)

No. 09-1423

JUL 26 2010

In The

Supreme Court of the United States

HORST SCHWINN, Guardian of Doerte Hesse and
MARCUS HESSEE, Guardian of Josef Hesse,

Petitioners,

v.

CHARLES STEPHEN EBBETS
and
LONG AND FOSTER REAL ESTATE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI AS TO NEW ISSUES RAISED BY RESPONDENT

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Dated: July 26, 2010

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LAW AND ARGUMENT

The Respondents, Long and Foster Real Estate, Inc. (Long and Foster) raises new matters in its Brief in Opposition to the Petition for a Writ of Certiorari.

Long and Foster argues that because the Plaintiff's sought Summary Judgment in the trial court that it should be barred from now claiming that it should not be entitled to complain about the Summary Judgment granted Long and Foster. However, Plaintiffs in the trial court alleged they were entitled to summary judgment as a matter of law because Long and Foster was required by statute and Virginia Regulations to supervise its salesman, particularly in this case Charles Stephen Ebbets. Plaintiffs also argued that despite that the evidence was overwhelming from the evidence that Long and Foster had the **power** to control Mr. Ebbets, irrespective of whether it chose to control him and that it had a duty to control him, making him its servant for purposes of respondeat superior.

Plaintiff's also contended that in the event the Court did not agree with them that they were entitled to Summary Judgment on those issues that it was then a jury issue. Further when prompted by the trial court, Plaintiff's conceded that the raw facts were not in dispute, but the interpretation of those facts or the reasonable inferences from those facts were in substantial dispute. The fact that both parties have opposing motions for summary judgment does not establish that there is no issue of fact nor does it require that summary judgment be

granted one of the parties. "Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences drawn from them." *S.J. Groves & Sons Co. v. Ohio Turnpike Comm.*, 315 F.2d 235, 237 (6th Cir. 1963) cert. denied, 375 U.S. 824. A party may concede there is no issue if his theory is accepted and yet maintain that if it is not then there are genuine issues of material fact in controversy. *Hindes v. United States*, 326 F.2d 150 (5th Cir. 1964).

In the 4th Circuit when queried about the application of the law and regulations requiring Long and Foster to supervise and control Mr. Ebbets as being dispositive, the Plaintiffs agreed that under Virginia law it was not determinative but an issue for the fact finder (jury) to consider. Statutorily mandated supervision is a factor to be considered by a jury in determining if one is an employee for purposes of tort liability (respondeat superior). *See Morvillo v. Shenandoah Memorial Hospital*, 547 F. Supp. 2d 528 (W.D. Va. 2008) and subsequent at 2008 U.S. Dist LEXIS 68595 (Sept. 10, 2008, W.D. Va.).

Too, Respondents fail to grasp the fundamental argument of the Plaintiff's that the Constitutional right to a jury trial is abridged (at least when as applied to a common law civil cause of action) where the reasonable inferences which can be taken from undisputed basic facts are divergent and could support either finding. In that case to deprive a party of a jury determination when prayed for (as hereinbefore) is a deprivation of fundamental rights under the Constitution.

Though Plaintiffs take issue with other arguments raised by Long and Foster, they cannot maintain that they really address new issues and therefore, consistent with the Rules of Court will not here attempt to address those issues.

CONCLUSION

This Court ought to grant this Petition for a Writ of Certiorari to define the bounds of summary judgment in a world where the common man is often denied his day in court and his day before a jury of peers as provided by the constitution in the interest of expediency. It is easy for a trial judge to substitute his or her judgment for that of a juror. All persons bring to their view of the world their disparate experiences and often we cannot reconcile how others have a different view, but that is to be protected when a jury rather than a judge decides issues which are subjective, which are subject to interpretation of facts, which are subject different view of the world as comes from the experience of different jurors. This Court should draw a line so it makes clear that though basic facts may not be in dispute, where they are subject to different interpretation, different conclusion and different inference, those cases are not appropriate for summary judgment and deserve the right to a jury trial.

Respectfully submitted,

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